

Summary Minutes of the
Delta Protection Commission Meeting
Thursday, March 27, 2008

ADMINISTRATIVE AGENDA (Items 1-4)

1. Call to Order/Flag Salute

Chairman Simonsen called the meeting to order at 5:40 p.m.

2. Welcome New Commissioner and Acknowledge Department Commissioner

Chairman Simonsen welcomed Gail Newton as a new member of the Commission. Ms. Newton is from the State Lands Commission and replaced Marina Brand. Chair Simonsen acknowledged the departure of Jeff Hart.

3. Roll Call

Present: Chairman Simonsen; Commissioners Armor, Cabaldon, Dawson, Dresser, Ferguson, Johnston, Kelly, McGowan, Newton, Nottoli, Reagan, Ruhstaller, Shaffer, Tilghman, van Loben Sels and Daniel Wilson.

Absent: Commissioners Calone, Johnson, Piepho and Mark Wilson. Note: Roberta Goulart provided non-voting input on behalf of Commissioner Piepho.

4. Public Comment

No one addressed the Commission during general public comment.

CONSENT AGENDA (Items 5-13)

Commissioner van Loben Sels moved Agenda Item 11 to the Regular Agenda.

Commissioner Cabaldon moved approval of the Consent Agenda; Commissioner Armor seconded. The motion was approved unanimously.

REGULAR AGENDA (Items 11, 14-18)

11. Receive Informational Update on the Process to Update the State Water Plan (SWP), Including Delta Workshop.

Commissioner van Loben Sels asked for a report from staff. Suzanne Butterfield gave an overview of the SWP and Delta Workshop. She said that DWR had a draft report on the Delta and how the Delta region fits in with the Central Valley Project update.

Commissioner van Loben Sels asked if Alex Hildebrand was present at the workshop. Ms. Butterfield said no; however Mr. Hildebrand's concerns were submitted by letter and read into the record at the workshop.

Commissioner Kelly moved approval of Agenda Item 11; Commissioner Ferguson seconded. The motion was approved unanimously.

14. Public Hearing on Resubmitted Old Sugar Mill Specific Plan - Clarksburg.

Dan Siegel stated that the Commission previously found that the Old Sugar Mill Specific Plan (OSMSP) was consistent with eight of the Commission's policies; however, was not consistent with three of the policies. He said the project could not proceed unless the Commission adopts written findings that the project as revised is consistent. Mr. Siegel said that the decision should be based on the record, including documents and testimony. He reported that questions were raised whether two commissioners could vote and his office concluded that there was no problem with the Commissioners' voting as long they kept an open mind. Mr. Siegel stated that the Commission should determine if the project as modified is consistent with its plan, and if so, the hearing would continue; or the Commission could find that the project is not consistent and again remand the matter back to Yolo County. Lastly, Mr. Siegel reminded the Commission that ex-parte communication was prohibited by the public or interested parties (written or oral) outside of the hearing and must be disclosed.

Mr. Siegel outlined the hearing procedures. He said the County of Yolo and project proponents would share 15 minutes total for testimony; the two appellants would share 15 minutes total for testimony; then the County of Yolo and project proponents would share 5 minutes for rebuttal testimony; and the public would have 3 minutes each.

Commissioner Wilson reported that he received letters from Gil Cosio and John Bohl.

Commissioner Newton reported that she contacted the DWR Levee Inspection Program to ask questions about the status of levees in RD 999.

Chair Simonsen reported that he was contacted by the Sacramento Bee, and received communications from John and Peggy Bohl, and the proponents' attorney; however he did not return the proponents' attorney call.

Commissioner Dresser reported that he was contacted by the Stockton Record.

Commissioner McGowan reported that he was contacted by the Sacramento Bee and had discussions with Yolo County counsel, David Morrison of the County of Yolo Planning Department, and Timothy Taron the project applicant's attorney.

Commissioner Dawson reported that she received an e-mail in favor of the OSMSP from a Clarksburg resident.

Commissioner Armor reported that he was contacted by the Sacramento Bee but declined to comment.

Commissioner Kelly reported that she met with Dave Guterrez and Rod Mayer, both of the DWR FloodSafe Program.

Linda Fiack announced that Commissioners were given copies of all correspondence received up until 1:00 pm. She said the current staff report includes background information on the original project and the revised project; and the analysis/findings adopted by the Commission on

February 2007 concerning the appeals filed by NRDC and the Concerned Citizens of Clarksburg. Ms. Fiack said the report also includes actions taken by the Commission that the OSMSP is in the Primary Zone, constitutes development, and has appealable issues and the staff found the project to be inconsistent with Land Use Policies 3 and 4, and Levees Policy 3. She reviewed the three policies that are inconsistent with the Plan and the basis for the findings. Ms. Fiack recommended that the Commission find the revised project is inconsistent with the three policies.

Ms. Fiack stated that although the project has been revised to relocate the buffer boundaries between agricultural and urban uses provided in the OSMSP, it would not ensure compatibility with urban development uses and future uses and therefore is not consistent with Land Use Policy 3.

Ms. Fiack stated that although the revised project has been pared down from 163 housing units to 123 elevated units, the revision involves new non-agricultural residential development in an area that has not been substantially documented with evidence of having support infrastructure and flood protection in place for such use and is therefore not consistent with Land Use Policy 4.

Ms. Fiack stated that staff is recommending the revised project be deemed not consistent with Levees Policy 4, as it includes a change in zoning from Heavy Industrial to a mixed use that includes 27% of the land being used for moderately high density residential development. Moreover, by increasing the amount of land zoned residential and placing an intense residential development on it, the project supports an increase in density and a decrease in the level of public safety in the area.

Chair Simonsen convened the public hearing.

Phil Pogledich, County of Yolo stated that Yolo County (County) has protected the agricultural character of the County by directing growth to existing urban areas and preventing significant conversion of farmland and open space. He said that 93% of the town is undeveloped and the County has not expanded the footprint in the past, nor plans to in the future. Mr. Pogledich said that the town of Clarksburg and the surrounding 35,000 acres of farmland are called the Clarksburg Agricultural District because of its social and economic fabric.

Mr. Pogledich said that the revised project comprises 105 acres which are not on farmland. He said that the revised project has 123 cottage cluster and single family units, a new fire station, community park, a walking trail and public boat dock. Mr. Pogledich said the EIR process began in 2004, was stopped in 2005 so that the County could re-write the section on flood protection. He said the revised project (1) requires that all new housing be elevated 1 ft above the base flood elevation for a 100-year flood, and (2) establishes a 300 ft no-build zone along the river levee to ensure that the project does not increase the risk of levee failure or flood hazard, or get in the way of any future levee repairs.

Mr. Pogledich said that the County has spent much time meeting on the project. He asked that the Commission proceed with respect for that time and not set aside the County's judgment in the absence of a compelling showing that the project is not consistent and is far out of line with the core principles of the Act and the Management Plan.

Tim Taron, Hefner, Stark & Marois, LLP said that Land Use Policy 3 has been misconstrued by the Commission; the policy is incorrect as it does not require a setback of 500 ft; however does require buffers, which may include setbacks, berms and vegetation. He also said the OSMSP provides a combination of all three. He said a memo prepared by the Yolo County Ag Commissioner explains why the buffer design would be effective to prevent conflicts between the OSMSP, adjacent vineyards and any other type of reasonably foreseeable agriculture. Mr. Taron said the Ag. Commissioner's memo is the only expert testimony in the record on the subject, and based on that testimony, the Commission must find the OSMSP consistent with Land Use Policy 3.

Mr. Taron said that the OSMSP puts residential use in the existing community and not on valuable Delta agricultural lands, and this type of proposal should be encouraged. He said that new housing within the OSMSP has the potential to reduce the conversion of farmland to ranchettes. Mr. Taron stated that the Commission's staff report ignores the issue but argues that the 123 housing units are not needed which is not correct because of the projection in the Yolo General Plan. He said that the OSMSP could generate 600 potential new jobs with the opportunity for those employees to live within Clarksburg. Mr. Taron said he hoped the Commission acknowledged the need for the additional units and for these reasons; the OSMSP is consistent with Land Use Policy 4.

Mr. Taron stated that parts of Levees Policy 3 do not apply to the OSMSP because the project is not dealing with a situation where there is a need for increased flood protection nor does the property increase density beyond what is allowed in the General Plan designation. He said that the "density" applies to residentially zoned units and the Commission is trying to interpret the meaning of the Yolo General Plan in terms of that word. He further stated that the Board of Supervisors found that density not only applies to residentially zoned land but industrially zoned lands and the County is in the best position to interpret its own legislation. Mr. Taron said that based on that, staff's opposition should be rejected and the project should be deemed consistent with Levees Policy 3.

Commissioner Cabaldon asked if the specific plan provided for restrictions on the conversion to ranchettes. Mr. Pogledich responded that the specific plan does not put any restrictions on housing outside of the specific plan. He also said the expectation is to provide housing on the project site that would provide an alternative to housing outside of town. Additionally, Mr. Taron said that at the present time, there are no available housing options in Clarksburg.

Commissioner Cabaldon also asked if there is a clause for converting from high industrial density to low industrial to housing. Mr. Pogledich said he did not believe there was such a plan.

Deborah Reames, EarthJustice, stated that the County continues to push for the project despite the fact that the project is up against the levee and would double the population of Clarksburg. She said that 100 year flood protection is not enough. She also said that three years ago DWR issued a report that said many existing floodplain maps are out of date and the County knows this because they are requiring the developer to identify levee improvements. She said the project would expose people and structures to a significant risk of loss, injury or death from a potential

levee failure. Ms. Reames further said that global warming is the reason why 100 year flood protection does nothing to lessen the risk of catastrophic flooding. She said the EarthJustice letter of March 13, 2008, explains that scientists have found that modest increases in global temperatures will dramatically reduce the Sierra snowpack, increasing runoff, and causing much higher peak flows in the Delta. She also said that as such, winter runoff is significantly higher in the Delta than it was 100 years ago.

Ms. Reames stated that Delta levees have failed a total of 162 times, with some failing more than once, and 11 of those failures within the last 20 years, which is why the Legislature has adopted two pieces of Delta-specific legislation that would integrate climate change considerations into agency planning. She went on to say that the County neglects to consider the likelihood of increased flooding due to global warming in its EIR. She urged the Commission to refuse to allow residential development that exposes the public to increased flood hazards with potential catastrophic results.

Jim Pachl, Concerned Citizens for Clarksburg, referenced a letter from the Central Valley Flood Protection Board (CVFPB) to the applicant expressing concerns about the lime removal operation at the OSMSP and asking the applicant to have geotechnical studies done. Additionally, Mr. Pachl referenced a letter from RD 999 which states that the Corps of Engineers completed a visual levee inspection in Solano County, determined that the levee provided less than 100 year flood protection and suggested that residents purchase flood insurance.

Mr. Pachl said that the County has touted the many benefits of the project; however, those benefits would only come from the daytime uses of the existing winery. He reported that the project touts the other developments in nearby West Sacramento, however, those developments will upgrade their levees while Clarksburg would not. Mr. Pachl said that residential development is not necessary for the success of the existing winery and would not create any new construction jobs; and the conversion of farmland to ranchettes is merely speculative. He concluded that staff has done a good job and asked that the Commission find the project inconsistent.

Commissioner Daniel Wilson asked if there should be no extra development past what was done in 1992 other than infill. Mr. Pachl responded that the area cannot support the kind of development being proposed.

Commissioner McGowan asked Mr. Pachl if there was a dispute that the project would create 600 jobs. Mr. Pachl responded that he had no opinion on the matter.

Commissioner Cabaldon asked if SB 5 applied to the project. Ms. Reames responded that SB 5 does not apply to the OSMSP, as it applies to more urban areas. Commissioner Cabaldon stated that the Commission should get guidance from the legislature as to the interpretation of the bill.

The following members of the public spoke during the public hearing:

Dennis Williams, Clarksburg
Mary Paula Albert, Clarksburg

Craig Carvalho, Carvalho Family Wines
Stephen Heringer, Heringer Helland, L&F
Bill Wells, Executive Director, California Delta Chambers and Visitor's Bureau
Ted Smith, Clarksburg
Hal Shipley, Clarksburg
John Bohl, Clarksburg
Peggy Bohl, Concerned Citizens of Clarksburg
Don Fenocchio, Clarksburg
John Carvalho, Old Sugarmill Clarksburg Wine Company
Katherine Merwin, Clarksburg
Russell van Loben Sels, Clarksburg
Marilyn van Loben Sels, Clarksburg
Judy Serpa, Clarksburg
Dave Wilson, Clarksburg
Steven Mello, President, RD 563; Director, North Delta Water Agency, Board Member CVFCA
Mike Dutra, Clarksburg
Phyllis Dutra, Clarksburg
Tony Dutra, Granite Bay
Jerry Spain, Clarksburg Advisory Committee
Lorna Kelso, Clarksburg
Jane Klotz
Lorraine Mizuno
Mark Stebbins, City of Stockton
Todd Taylor, Todd Taylor Wine Group, Inc.
Diana L. Patrick, Realtor
Susan Pelican, Sierra Club
Brett Baker, Courtland
Lisa Kirk, Bethel Island
John Boudier, Clarksburg
Linda Boudier, Sacramento
Mariko Yamada, Yolo County Board of Supervisors
Alicia Fernandez, Clarksburg

Chair Simonsen closed the public hearing.

Rebuttal Testimony

Phil Pogledich stated that the County looked into climate change very closely. He said the County pulled all the information it could on the subject and found the information general in nature and could not find the answer to what the effects of climate change would be for the Delta. He said that based on that information; there was no reason to go back to the applicant to revise the project.

Tim Taron stated that SB 5 does apply to the OSMSP and elevation does work. He said that that if the Commission does not allow housing to be developed on this Brownfield site, with elevations consistent with SB 5, and within a consistent community within the Delta, the

Commission is saying no housing in the Delta until the levees are fixed. Mr. Taron said that if this happens then communities such as Clarksburg will die.

Commissioner Armor asked what the price range for the homes was. Mr. Taron responded that the homes would range from \$200,000 for low income units and \$300,000 for medium income units.

Commissioner Reagan asked what the population of Clarksburg in 1992 was. Mr. Pogledich responded it was around 400 people. Commissioner Reagan noted that an aging population has resulted in a demographic shift. Mr. Pogledich responded that he did not know about that demographic shift but noted that many of the homes were bought by affluent people.

Chair Simonsen asked Mr. Taron to explain his letter of March 7, 2008 which stated that information coming out of other processes was not relevant to the OSMSP and should not be taken into consideration. Mr. Taron responded that his letter merely stated that only the Commission's policies are the three legal standards that have to be met and not the standards of the Blue Ribbon Task Force.

Chair Simonsen also asked Mr. Taron if industrial land was part of ag land. Mr. Taron responded that the site was not replaceable, has heavy lime deposits, and is more suited for Brownfield reuse.

Ms. Fiack stated that the Commission had before it the staff recommendations for Land Use Policy 3; Land Use Policy 4 and Levees Policy 3. She further stated that the Commission could adopt or reject staff's recommendations, or direct staff to return at a future date with recommendations.

Land Use Policy 3

Commissioner Shaffer asked Mr. Siegel if the setback of 500 to 1,000 ft noted in Land Use Policy 3 were permissive or prescriptive. Mr. Siegel responded permissive.

Commissioner McGowan said the Commission should weigh heavily on the analysis and recommendations of the Ag. Commissioner. He urged the Commission to find the OSMSP consistent with Land Use Policy 3.

In response to a question asked by Commissioner Kelly, Ms. Fiack asked when the berm would be included in the project. Mr. David Morrison, Yolo County, responded that the berm would be constructed on parcels 5 and 6 simultaneously with the construction of any of the other improvements to the parcels.

Commissioner Daniel Wilson said that there is a no zero risk scenario for the Delta. He said that a 300-ft buffer is adequate and he did not think the Commission should argue with the experts nor usurp the County's role. He said he is concerned that the Commission might try to micromanage every single project in the Delta.

Commissioner Cabaldon stated that he agreed with the Ag. Commissioner's recommendations and felt the Commission should be careful and not get into the smaller issues.

Chair Simonsen said he agreed with Commissioner Cabaldon, but felt that with the higher standards from state and federal government, the Commission must ensure that agricultural usage would have no impact on existing or future residences in the Primary Zone.

Commissioner van Loben Sels commented that the Commission should be cognizant of the density of the single family homes. He said the problem is that the homes would be located in the area where sulfur, dust and spraying would happen. He said that Land Use Policy 3 calls for a 500-ft to 1,000-ft buffer and should be adhered to. Commissioner McGowan responded that the homes would be located in another area of the project and the policy states that the buffer may be 500 to 1,000 feet.

Commissioner Johnston moved that the OSMSP is inconsistent with Land Use Policy 3; Commissioner van Loben Sels seconded. The motion did not pass.

Commissioner Kelly said that the Commission was not setting a precedent and the County would feel any ramifications if the buffer was insufficient. She said that if the Commission faced the issue again, it could be addressed on a site specific basis. Commissioner Kelly said she was inclined to let the decision lie with the County as they would feel any impacts.

Commissioner McGowan moved that the OSMSP is consistent with Land Use Policy 3; Commissioner Wilson seconded. The motion was approved 11:6. (Ayes: Armor, Cabaldon, Dresser, Ferguson, Kelly, McGowan, Newton, Nottoli, Reagan, Ruhstaller, Wilson

Noes: Dawson, Johnston, Shaffer, Simonsen, Tilghman, van Loben Sels).

Land Use Policy 4

Commissioner McGowan asked if the location of the levees was the reason the staff report recommended that the OSMSP is inconsistent with Land Use Policy 4. Ms. Fiack responded that the staff recommendation of inconsistency reflects that the proposal includes actions that acknowledge the infrastructure in place is not known to provide sufficient flood protection for public health and safety. She cited excerpts from the environmental document relative to unavoidable impacts, the proposal to elevate the homes, and the provision for the project proponent to perform a geotechnical evaluation (although the County's approval does not require the applicant to address the outcome of such a study) as examples. She also noted acknowledged potential for over topping and seepage at the project site, and the potential for potential impacts relative to levees located immediate above and adjacent to the project site to impact the site.

Commissioner McGowan asked that if the County fixed the levee, but did not touch the other levees in the Clarksburg District then would it meet the true intention of the Delta Protection Act. Chair Simonsen responded that a levee failure anywhere that would flood the OSMSP is an impact; moreover, it was the role of the Commission is to ensure that there is no large increase of development in an area prone to flooding.

Commissioner Daniel Wilson said that he felt that if the Commission deems the project inconsistent with Policy 4, it is saying that the other 35 miles of levees are inadequate and is therefore implying that the rest of the Delta levees are inadequate—therefore, if the OSMPS is inconsistent with the policy, so is the entire Delta.

Commissioner Cabaldon said that the findings in the staff report are way overbroad and the Commission is reading too much into the flood protection issue. He said that if the Commission applied the policy language on what flood protection means, then no development could go on anywhere. He also said the issue has been addressed by the Legislature; however the laws/standards applied to towns like Clarksburg are the FEMA standards.

Commissioner van Loben Sels said that he saw problems with putting homes on stilts. He further said that under the Delta Vision, legacy towns will be preserved.

Commissioner Kelly said she felt that the elevation of the proposed housing is not a safe situation and should be addressed and did not feel it was the intent of the Act to have the Commission approve a project that would decrease public safety.

Commissioner McGowan said the Commission must support the residents, the economic improvements, economic enhancement and vitality of Clarksburg. He said the Commission has three choices: (1) fix the levees; (2) build homes to a level where residents will be safe; or (3) create a de facto moratorium.

Commissioner Reagan said that the defacto moratorium is because of the Paterno decision which has produced “sticker shock” throughout the State. He said that adopting staff’s recommendations/findings as submitted would constitute a regulatory taking of all entitlement to build anything in the Delta. He also said that Delta communities should be allowed to continue, evolve, and thrive.

Mr. Siegel clarified that the Commission’s jurisdiction is limited to the Primary Zone and excludes existing zoning entitlements.

Chair Simonsen said that the County seemed to acknowledge the potential flood threat with the raising of the homes and that he was bothered by the underground utilities portion of the project.

Commissioner Johnston commented that the OSMSP is unique because there has not been a non-agricultural subdivision proposed in the Primary Zone in the 15-year history of local government decisions under the Delta Protection Act. He further said that at that time, the Act contemplated that communities would grow out with what entitlements and land uses existed at the time.

Commissioner Johnston said this was not a retreat but was done intentionally. He also said that to contemplate communities growing out by non-agricultural, residential subdivisions is to invite a higher level of flood protection. Commissioner Johnston asked Commissioner Cabaldon if state law should require 100 year flood protection. Commissioner Cabaldon said that SB 5/FEMA is the appropriate standard.

Commissioner Shaffer asked if the project met FEMA standards and if there would be a requirement of the property owners to obtain flood insurance. Commissioner McGowan

responded that the developer would pay flood insurance for a short period of time for the non-affordable homes and for an extended time for the affordable homes.

Chair Simonsen stated that the relevance of the need for the housing has not been addressed consistent with Land Use Policy 4. Commissioner McGowan responded that number of units is small compared to the size of the Clarksburg District. He said the County and locals spent a great amount of time to find the appropriate level of growth to invigorate the community and that the Commission should have sophisticated analysis to find otherwise.

Commissioner Daniel Wilson moved that the OSMSP is consistent with Land Use Policy 4; Commissioner Ruhstaller seconded. The motion was not approved.

Roberta Goulart said that more discussions should take place on Land Use Policy 4. She said the Commission is trying to apply a 1992 policy to a situation that has evolved and it would be doing itself a great disservice if it moved ahead on a quick interpretation of the issue. She said that many of the issues are unclear and needed to be defined.

Commissioner Cabaldon moved that Land Use Policy 4 be postponed until the May 22, 2008 meeting; Commissioner Reagan seconded. The motion was approved 10:7. (Ayes: Armor, Cabaldon, Dawson, Dresser, Ferguson, Kelly, McGowan, Nottoli, Reagan and Ruhstaller
Noes: Simonsen, Johnston, Newton, Shaffer, Tilghman, van Loben Sels, Wilson).

Levees Policy 3

After a brief discussion, Commissioner Kelly moved that the OSMSP was inconsistent with Levees Policy 3; Commissioner Johnston seconded. The motion was approved 11:6. (Ayes: Armor, Dawson, Dresser, Ferguson, Johnston, Kelly, Newton, Shaffer, Simonsen, Tilghman, van Loben Sels

Noes: Cabaldon, McGowan, Nottoli, Reagan, Ruhstaller, Wilson).

15. Receive Informational Update on Delta Vision, Including the Formation of Work Plan Groups, Particularly Delta as a Place, and Governance and Strategic Planning.

This item was tabled.

16. Commissioner and Staff Comments/Announcements

There were no comments or announcements.

17. Closed Session

The Commission adjourned to closed session at 11:30 p.m.

18. ADJOURN

The meeting was adjourned at 11:35 p.m.